

LEX REX INSTITUTE

ALEXANDER H. HABERBUSH, ESQ. SBN 330368

DEBORAH L. PAULY, ESQ. SBN 350345

444 West Ocean Boulevard, Suite 1403

Long Beach, CA 90802

Telephone: (562) 435-9062

E-mail: AHaberbush@LexRex.org

HEATH LAW, PLLC

RYAN L. HEATH, ESQ. AZ SBN 036276*

AMBER R. TERRY, ESQ. DC SBN 1766035*

16427 N. Scottsdale Rd., Suite 370

Scottsdale, Arizona 85254

Telephone: (480) 522-6615

E-mail: ryan.heath@thegavelproject.com

**pro hac vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

B.B., a minor by and through her
mother, Chelsea Boyle,

Plaintiffs,

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT; JESUS BECERRA, an
individual in his individual and official
capacities; CLEO VICTA, an
individual in her individual and official
capacities; and DOES 1 through 50,
inclusive,

Defendants.

CASE NO. 8:23-cv-00306-DOC-ADS

*Assigned for All Purposes to:
Hon. David O. Carter – Courtroom 10A*

**PLAINTIFF'S OPPOSITION OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Hearing Date

Date: February 12, 2024

Time: 8:30 a.m.

Dept.: 10A

Trial Date: March 12, 2024

Complaint Filed: February 21, 2023

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SECONDARY AUTHORITY

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RULES

Federal Rule of Civil Procedure 56. 6

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff B.B. (“B.B.”) was a seven-year-old first grade student at Viejo Elementary School in March 2021 when she drew a picture portraying children of various races, holding hands. In this drawing, B.B. included the phrase “Black Lives Mater” and “any life.” B.B. gifted the drawing to her friend, who is also a classmate, Marlena Clay (“M.C.”). M.C. put the drawing in her backpack and when she got home that day, M.C.’s mother, Cathy Clay (“Clay”) went through her daughter’s backpack and found the drawing. The drawing became known to Clay off campus and outside of school hours. Clay did not know who gave the drawing to M.C., so she contacted the school, asking them to investigate it.

On March 31, 2021, the principal of Viejo Elementary School at the time, Jesus Becerra, (“Becerra”) began to investigate into the drawing, but Becerra only spoke to one student – B.B. While on the playground on March 31, 2021, B.B. was at recess when Becerra approached her and encouraged her to follow him to the “big tree.” B.B. followed Becerra and was met with a reprimand for the drawing and told that the drawing was not only “inappropriate” and “racist” but that B.B. was not allowed to create pictures for her friends anymore. Before walking away, Becerra made sure to tell B.B. she needed to apologize for the drawing. B.B. was given no explanation for why she had to apologize, except that the drawing was “inappropriate” and “racist” and that M.C.’s parents did not like it. B.B. was left with shame and embarrassment for what she drew, not knowing why. B.B. found M.C. to apologize. In fact, B.B. felt so much shame for her drawing, that she apologized a second time to M.C. in the classroom. After settling back into class after recess, B.B. was told by the paraeducator, Ms. Mesa, that B.B. was to sit out of recess for two weeks. B.B. was given no other explanation but felt too discouraged at this point to question the discipline. B.B. did in fact sit out of recess for the next

1 two weeks.

2 B.B. did not discuss the events that occurred with Becerra on March 31, 2021,
3 with her parents as she feared further punishment for the drawing at home. B.B.
4 came away from school on March 31, 2021, believing that the picture she drew was
5 wrong. It would not be until eleven (11) months later that B.B.'s mother, Chelsea
6 Boyle ("Boyle") would find out through another parent at the school, Jen Owen,
7 ("Owen") about what had transpired. Boyle immediately reached out to Becerra and
8 Capistrano Unified School District ("CUSD") for an investigation. Boyle went
9 through the formal complaint process with CUSD and submitted a Tort Claim and e-
10 mails to apprise them of the issues that were still unresolved.

11 As a result of Boyle demanding a proper investigation into the disciplinary
12 actions taken regarding B.B. and her drawing, B.B. was retaliated against by
13 Becerra and Victa. Approximately eighteen (18) months after the initial incident,
14 during the appeals process, B.B.'s brother was walking in the school courtyard, near
15 the school buildings and still within schoolhouse gates, when Becerra called Cleo
16 Victa ("Victa"), the school counselor, to monitor B.B.'s brother. Although, Victa
17 confirms that Becerra did not have a safety concern. In video footage, Victa walks
18 outside to follow B.B.'s brother, with Becerra standing in the frame simply
19 watching the events occur. B.B. walked outside and realized her brother was
20 distraught. B.B. attempted to console her brother but found Victa was following
21 uncomfortably close. B.B. asked Victa to leave them alone but Victa refused. Again,
22 all the while Becerra stood by doing nothing. B.B.'s brother eventually went back to
23 class and B.B., still scared, went to the restroom, where Victa began to follow her
24 further. B.B. called her mother, Boyle, and asked her mother to pick her and her
25 brother up.

26 Defendants claim that there is no support for B.B.'s First Amendment claim,
27 however, discovery has yielded ample factual support that B.B.'s First Amendment
28

1 rights were indeed violated. First, when Becerra, who was aware of established law
 2 and CUSD Board policies (which prohibited his conduct), still decided to make the
 3 calculated choice to reprimand B.B. and then further punish her by telling her to
 4 refrain from drawing for her friends and forcing B.B. to apologize to M.C. Then,
 5 Becerra and Victa decided to further retaliate against B.B. The facts and supporting
 6 evidence surrounding these incidents are more than enough to defeat a summary
 7 judgment motion as a reasonably jury could find for B.B.

8 Defendants Becerra and Victa claim they are entitled to qualified immunity.
 9 To defeat a claim of qualified immunity, a plaintiff must show that “the official
 10 violated a statutory or constitutional right, and (2) that the right was clearly
 11 established at the time of the alleged conduct.” *Padilla v. Yoo*, 678 F.3d 748, 755
 12 (9th Cir. 2012). *See Sampson v. Cty. of Los Angeles*, 974 F.3d 1012 (9th Cir. 2020).
 13 B.B.’s First Amendment rights were violated under *Tinker*. *See Tinker v. Des*
 14 *Moines Ind. Community School Dist.*, 393 U.S. 503 (1961). Further, the
 15 constitutional rights that were violated were “clearly established” at the time of the
 16 events. *United States v. Lanier*, 520 U.S. 259, 271 (1997). “In the absence of
 17 binding precedent, district courts should look to ‘all available decisional law
 18 including the decision of *state courts, other circuits, and district courts* to determine
 19 whether the right was clearly established.” *Id.* at 271(emphasis added).

20 In cases, such as this, where facts are largely *undisputed*, B.B. has still shown
 21 that genuine issue exists for trial because “reasonable minds can differ as to the
 22 ultimate conclusions to be drawn from those facts.” *Sankovich v. Life Ins. Co. of*
 23 *North America*, 638 F.2d 136, 140 (9th Cir. 1981). As set forth in further detail
 24 below, Defendants are **not** entitled to summary judgment, jointly or individually.

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II. FACTUAL BACKGROUND

In March 2021, B.B. illustrated a picture portraying children of various races holding hands. (Exhibit L). The drawing states “Black Lives Mater” and “any life”. (Exhibit L). Because she wanted to be kind, B.B. gave the drawing to her friend, M.C. (Deposition of B.B. Vol 1, p 17:15-16 (“B.B. Depo. Vol. 1”). When M.C. got home that day, her mother, Clay, began to clear out her backpack and noticed the drawing. Clay reached out to the school to inquire into the drawing. (Deposition of Cathy Clay pg. 27:19 (“Clay Depo”). Clay did not know which child drew the picture but gave a few names. (Clay Depo pg. 35: 19-21) Becerra was made aware of Clay’s email and decided to speak to B.B. (GD No. 5.). While at recess, Becerra tapped B.B. on the shoulder, implying she should follow him. (B.B. Depo. Vol. 2, pg. 19:17-25) B.B. followed Becerra to a location near the “big tree” by the playground. (B.B. Depo. Vol. 1, pg. 19:3-5) Becerra spoke to B.B. about the drawing. (B.B. Depo. Vol. 1, pg. 20:9-10). B.B. admitted to drawing the picture that Clay was speaking about. (B.B. Depo. Vol. 1, pg. 20:12-18). Becerra told B.B. that the drawing was “inappropriate” and “racist” and that M.C.’s parents didn’t like it. (B.B. Depo. Vol. 1 pg. 34:2-4). Becerra further told B.B. that she could no longer make drawings for her friends anymore, and that she needed to apologize to M.C. (B.B. Depo. Vol. 1, pg. 18 23-25). B.B. did as Becerra told her and apologized to M.C. (B.B. Depo. Vol. 1, pg. 22:16-17). B.B. felt so ashamed and embarrassed of her drawing that she proceeded to apologize a second time to M.C. when recess was over. (B.B. Depo. Vol. 1, pg. 34:10-12). Once back inside the classroom, the paraeducator, Ms. Mesa, informed B.B. that she would have to sit out from recess for two weeks. (B.B. Depo. Vol. 1, pg. 29:22-24). B.B. felt so discouraged by her discipline at the school that she didn’t bring it up to Boyle, who B.B. thought would have already been told by Becerra about the situation. (B.B. Depo. Vol. 2, pg. 63:16-19).

1 Approximately eleven (11) months later, Boyle was told by another parent at
2 the school about the events that occurred on March 31, 2021. (Exhibit N). Because
3 Boyle had not been informed by Becerra or CUSD about the incident, she requested
4 an investigation, but Becerra denied having disciplined B.B. at all. (Becerra Depo,
5 pg. 19:18-23). However, M.C. told Clay that B.B. apologized out of the blue on the
6 playground. (Clay Depo pg. 96:7-17).

7 Forward to August 31, 2022, B.B.'s brother was walking around the courtyard
8 when Becerra radioed for Victa to join him. (Deposition of Cleo Victa, pg. 18:15-16
9 ("Victa Depo")). Victa walked outside and began closely following B.B.'s brother.
10 (B.B. Depo Vol 2, pg. 53:5-7). B.B. eventually joined the scene and asked Victa to
11 stop following them. (B.B. Depo Vol 2, pg. 53:5-7). Victa proceeded to aggressively
12 follow B.B. (B.B. Depo Vol 2, pg. 68:8-24). B.B. decided she needed to be escape
13 Victa's pursuits. (B.B. Depo Vol 2, pg. 68:8-24). However, Victa still followed B.B.
14 to the girls' restroom. (B.B. Depo Vol 2, pg. 68:8-24). As a result of the experience,
15 B.B. called Boyle to pick her and her brother up. (B.B. Depo Vol 2, pg. 68:8-24). As
16 a result of this experience, B.B. began to suffer even more severely, enough that her
17 emotional injuries began to manifest into physical injuries. (B.B.'s Response to
18 Victa's Interrogatories, No.7) (Exhibit M).

19 III. PROCEDURAL HISTORY

20 Plaintiff B.B.'s initial Complaint listed seven causes of action and included
21 her mother and guardian ad litem, Boyle, as a Plaintiff in her individual capacity.
22 Pursuant to the Court's Order, (Dkt. No. 55), Boyle was dismissed as a Plaintiff
23 from the Second Amended Complaint. Consequently, B.B. filed a Third Amended
24 Complaint in which the Defense filed a Motion to Dismiss. Per the Court's most
25 recent Order, B.B.'s surviving causes of actions are:

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- i. First Cause of Action against Becerra for First Amendment violations,
- ii. Third Cause of Action against Becerra and Victa for Intentional Infliction of Emotional Distress,
- iii. Fourth Cause of Action against CUSD for Negligent Supervision and/or Retention, and
- iv. Fifth Cause of Action against Becerra and Victa for Retaliation in violation of B.B.'s First Amendment right.

IV. DEFENDANTS, JOINTLY AND INDIVIDUALLY, ARE NOT ENTITLED TO SUMMARY JUDGMENT

Summary judgment is required when, the evidence viewed in the light most favorable to the nonmoving party, “shows that there is no genuine issue as to any material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-324 (1986); *See* Fed. R. Ci. P. 56(c); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 324. “Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial.” *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F.Supp.2d 1094, 1100 (C. Dist. Ct. 2010). *See Celotex*, 477 U.S. at 323-334. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

It is well settled that “[g]enuine disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. The nonmoving party must “identify specific evidence from which a reasonable jury could return a verdict in its favor.” *Aprin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). That is, the nonmoving party “may show that a genuine issue exists for trial if, although the facts are largely undisputed, reasonable minds could differ as to the ultimate conclusions to be drawn from those facts.” *J.C. v. Beverly Hills*

1 *Unified Sch. Dist.*, 711 F.Supp. 2d 1094, 1100 (2010) (emphasis added). *See*
 2 *Sankovich v. Life Ins. Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981). *See*
 3 also 49 *C.J.S. JUDGMENTS* § 301 (2009) (even where courts believe the moving
 4 party is more likely to prevail at trial, summary judgment must be denied if a
 5 reasonable jury could return a verdict for the nonmoving party).

6 Here, there are genuine issues of material facts, as will be made known
 7 herein, that should properly be put in front of a jury, where a reasonable jury could
 8 find in favor of B.B.

9 **V. BECERRA AND VICTA ARE NOT ENTITLED TO QUALIFIED** 10 **IMMUNITY**

11 The courts conduct a two-step inquiry to determine whether defendants are
 12 entitled to qualified immunity. *Pearson v. Callahan*, 555 U.S. 223 (2009). Though
 13 these tests need not be conducted in this order. *Id.* One inquiry is whether a plaintiff
 14 has asserted facts that amount to a violation of her federal constitutional rights. *Id.*
 15 *See Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1005 (9th Cir. 2017). The second
 16 inquiry is whether the law surrounding that constitutional violation was "clearly
 17 established" when defendants acted. *Lassonde v. Pleasanton Unified Sch. Dist.*, 320
 18 F.3D 979 (9th Cir. 2003).

19 **A. B.B. has established that her First Amendment right was violated** 20 **such that Becerra is not entitled to Qualified Immunity**

21 Beginning with the first inquiry under qualified immunity, the issue is
 22 whether there was a violation of B.B.'s First Amendment right to free speech. When
 23 referring to violations of student free speech in public schools, there are three trains
 24 of thought, each bearing its own precedent. The first category deals with "vulgar,
 25 lewd, obscene, and plainly offensive speech;" the second category deals with
 26 "school sponsored speech;" and the third category which is more of a catchall,
 27 includes "speech that falls into neither of" the other two categories. *Lavine v. Blaine*
 28

1 *Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001). Here, Plaintiff agrees with Defendants
 2 that this case is governed by the third category, controlled by the *Tinker* test. *Tinker*
 3 *v. Des Moines Ind. Community School Dist.*, 393 U.S. 503 (1961).

4 The Supreme Court makes clear in *Tinker* that public school students do not
 5 “shed their constitutional rights to freedom of speech or expression at the
 6 schoolhouse gate.” *Tinker*, 393 U.S. at 506. However, school discipline may be
 7 appropriate “where the facts reasonably lead school authorities to forecast
 8 substantial disruption of or material interference with school activities” due to the
 9 student’s speech. *Id.* at 514. The test to determine whether a student’s First
 10 Amendment right should be protected is to “examin[e] only the effect of the speech
 11 on school activities and the rights of others. *Pinard v. Clatskanie School Dist.* 6J,
 12 467 F.3d 755, 766 (9th Cir. 2006). In fact, “the decision to discipline speech must be
 13 supported by the existence of specific facts that could reasonably lead school
 14 officials to forecast disruption.” *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th
 15 Cir. 2001). However, the regulation or discipline of speech in a public school **must**
 16 **be caused by “something more than a mere desire to avoid the discomfort and**
 17 **unpleasantness** that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S.
 18 at 509. (emphasis added). *See also Teminiello v. Chicago*, 337 U.S. 1 (1949) (“Any
 19 word spoken in a class, in the lunchroom, or on the campus, that deviates from the
 20 views of another person may start an argument or cause a disturbance. But our
 21 Constitution says we must take the risk.”) (emphasis added). The “mere fact that
 22 students are discussing the speech, without more, likely will be insufficient to meet
 23 the *Tinker* standard.” *J.C.*, 711 F.Supp. 2d at 1100.

24 Here, B.B., a first grader at a public school, created a drawing for a classmate,
 25 M.C., in a showing of friendship. (B.B. Depo Vol 1, p 17:15-16). B.B.’s drawing
 26 states, “Black Lives Mater,” and “any life.” (Exhibit L). M.C.’s mother, Clay, knew
 27 that the drawing was not harmful to her child. (Clay Depo pg. 70:23-25).
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1 Unfortunately, Becerra disciplined B.B. for the drawing. (B.B. Depo Vol 1, pg.
 2 13:21). Becerra told B.B. that the drawing, for what it portrayed, was
 3 “inappropriate” and “racist” and that she was not allowed to draw pictures for her
 4 friends anymore. (B.B. Depo Vol 1, pg. 33:16-20). Becerra further compelled B.B.
 5 to apologize to M.C. for the drawing. (B.B. Depo Vol 1, p 22:16-17). Clay did not
 6 want nor expect an apology from B.B. (Clay Depo pg. 94:7-25). B.B.’s drawing did
 7 not cause any disturbance in the classroom, nor would be considered vulgar or
 8 obscene so that the school would be able to forecast a potential disruption. (Clay
 9 Depo pg. 94: 7-25). Clay’s perception of the drawing was that it was to make her
 10 daughter, M.C., “feel comfortable,” showing a lack of infringement on M.C.’s
 11 rights. (Clay Depo pg. 71:20-25).

12 According to the Ninth Circuit, “federal courts should treat the *Tinker* rule as
 13 a flexible one dependent upon the totality of relevant facts in each case.” *Karp v.*
 14 *Becken*, 477 F.2d 171, 174 (9th Cir. 1973) (emphasis added) *See also Grayned v.*
 15 *City of Rockford*, 408 U.S. 104, 119 (1972). For no apparent reason, other than
 16 simply feeling uncomfortable with B.B.’s expression in art form—Becerra punished
 17 her—thereby suppressing her speech and further compelled her to apologize for it.
 18 (B.B. Depo Vol 1, pg. 22:16-17). Just as in *Tinker*, where there was no evidence of
 19 the “school officials’ forecast of disruption of the educational processes”, Becerra
 20 had no reasonable foresight that B.B.’s drawing would lead to disruption
 21 considering Clay’s own remarks. *Karp*, 477 at 174. Consequently, and based on the
 22 totality of relevant facts in this case, B.B.’s constitutional right to free speech was
 23 clearly violated by Becerra.

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B. B.B. has established that her First Amendment right was “clearly established” such that Becerra is not entitled to Qualified Immunity

The second prong in the inquiry for whether qualified immunity is appropriate, involves the question of whether the defendant should have reasonably known that he was violating the plaintiff’s constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That is, whether the right was “clearly established” to a reasonable person. *See Davis v. Scherer*, 468 U.S. 183, 197 (1984).

It is settled that “the focus is on whether the officer had **fair notice** that [the officer’s] conduct was unlawful.” *Rodriguez v. Cty. Of Los Angeles*, 891 F.3d 776, 795 (9th Cir. 2018) (*quoting Kisela v. Hughes*, 138 S.Ct. 1148 (2018)) (emphasis added). Qualified immunity does not protect officials who violate “clearly established statutory constitutional rights of which a reasonable person would have known.” *Harlow*, 457 U.S. at 818. A right is “clearly established” when “its contours are sufficiently clear that reasonable officials would know that their actions violated that right.” *Pearson*, 555 U.S. at 231 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To adequately “determine whether a law is clearly established, the court ‘surveys the legal landscape’ and examines those cases that are ‘most like’ the present case.” *J.C.*, 711 F.Supp.2D at 1124. (*quoting Figueroa v. United States*, 7 F.3d 1405, 1409 (9th Cir. 1993)). However, the Ninth Circuit has made clear that “**specific binding precedent is not required** to show that a right is clearly established for purposes of the qualified immunity analysis.” *Maraziti v. First Int’l Bank of Calif.*, 953 F.2d 520, 525 (9th Cir. 1992) (*quoting Brady v. Gebbie*, 859 F.2d 1543, 1557 (9th Cir. 1988)) (emphasis added). “In the absence of binding precedent, district courts should look to ‘all available decisional law.’” *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (1986). Conversely, “[w]here the specific factual scenario presented has not been previously litigated and decided,

1 the court may nonetheless find clearly established law if “a general constitutional
 2 rule already identified in the decisional law [applies] with obvious clarity to the
 3 specific conduct in questions.” *Lanier*, 520 U.S. at 271. When “an official could be
 4 expected to know that certain conduct would violate statutory or constitutional
 5 rights, *he should be made to hesitate.*” *Harlow*, 457 U.S. at 819 (emphasis added).

6 A “clearly established” right is one that must be sufficiently clear [so] that a
 7 reasonable official would understand that what he is doing violated that right.”
 8 *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Supreme Court has provided
 9 the *Harlow* standard for what “clearly established” means will “depend substantially
 10 upon the level of generality at which the relevant ‘legal rule’ is to be identified.” *Id.*
 11 at 639. To ensure that a particular government official has received necessary
 12 guidance, the court should focus the “qualified immunity inquiry at the level of
 13 implementation.” *Brewster v. The Bd. of Ed.*, 149 F.3d 971, 977 (9th Cir. 1998). *See*
 14 *Lynwood Unified Sch. Dist.* 149 F.3d 971 (9th Cir. 1998).

15 Today, Plaintiff concedes that the legal landscape involving the same factual
 16 pattern in this case, is bare. However, B.B. need not find factual precedent exactly
 17 on point to succeed in this argument. *See Maraziti v. First Int’l Bank of Calif.*, 953
 18 F.2d 520, 525 (9th Cir. 1992) (*quoting Brady v. Gebbie*, 859 F.2d 1543, 1557 (9th
 19 Cir. 1988)). B.B. need only show that the law in question has been established for a
 20 reasonable person. *Brewster*, 149 F.3d at 977. While the reasonableness of the facts
 21 are to be reviewed by a jury, “the ‘clearly established’ inquiry is a question of law
 22 that only a judge can decide.” *Morales v. Fry*, 873 F.3d 817, 821 (9th Cir. 2017).

23 Prior to diving into the legal landscape, it is critical to point out that
 24 ultimately, the determination of what manner of speech is inappropriate in a public
 25 school “properly rests with the school board.” *Bethel Sch. Dist. V. Fraser*, 478
 26 U.S. 675, 683 (1986). Here, Becerra is a principal within CUSD and is subject to be
 27 aware of, and on notice of, CUSD guidance and policy. CUSD board Policy 5184(a)
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1 details the restrictions and disciplinary methods tolerated by CUSD for its staff.
 2 (Exhibit H). There is specific guidance on controversial issues (*cf.* 6144) and
 3 relevant case law cited for staff members of CUSD to be made aware of. Being the
 4 principal of Viejo Elementary, and an employee of CUSD, puts Becerra, and any
 5 reasonable employee, on notice that his actions regarding B.B.'s drawing were
 6 unconstitutional. His actions were not done impulsively, he had time to hesitate.

7 In *Tinker*, students wore black armbands to “publicize their objections” to the
 8 war. *Tinker*, 393 U.S. at 504. The students’ decision to wear black armbands was
 9 met with discipline by the school principal. *Id.* The Supreme Court held it would not
 10 move the line between free speech and speech that may be restricted in a public-
 11 school setting, that far. *Id.* at 514. The Court in *Tinker* drew the line that student
 12 speech, or expression of that speech, cannot be prohibited or disciplined when the
 13 speech does not cause “a disturbance” in school activities. *Id.* at 505. While the
 14 activity of wearing black armbands was a clear visual symbol to be seen by the
 15 entire school, the Supreme Court found it wasn’t enough to restrict their speech. *Id.*
 16 at 513-514. *Tinker* has been settled law since 1969. *Id.* While the students’ speech in
 17 *Tinker* may have “caused discussion outside of the classrooms,” there was “no
 18 interference with work and no disorder.” *Id.* at 514. “They neither interrupted school
 19 activities nor sought to intrude in the school affairs or the lives of others.” *Id.*

20 Here, B.B. did not wear a black armband or display her drawing in a way that
 21 would put the entire school on notice of it. B.B. merely drew a picture portraying
 22 children of various races holding hands. (Exhibit L). The words on the drawing are
 23 “Black Lives Mater,” and “any life.” (Exhibit L). Then, without any interruption in
 24 school activities, B.B. gave that drawing to a friend, M.C. (B.B. Depo Vol 1, pg.
 25 17:15-16). That is the extent of B.B.’s actions. Unlike in *Tinker*, where the students
 26 wore distinct black armbands and walked around the campus, to be seen and
 27 discussed, B.B.’s drawing made it in front of the eyes of only *one* friend and her
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1 parents. No other students were given the drawing, nor were any activities at Viejo
 2 Elementary suspended or foreseen to be disrupted as a result of B.B.'s drawing. Just
 3 as in *Tinker*, where there was no interruption in school activities nor did the students
 4 seek to intrude on the lives of others, B.B. caused no disruptions nor intended to
 5 negatively impact the school or M.C. when she gave her the drawing. (Clay Depo
 6 94:7-11). However, like the principal in *Tinker*, Becerra decided that B.B.'s form of
 7 expression was inappropriate and subject to discipline. (B.B. Depo Vol 1, p 22:7).
 8 Becerra disciplined B.B. by telling her that the drawing was "inappropriate" and
 9 "racist." (B.B. Depo Vol 1, pg. 33:16-20). Becerra informed B.B. that she could no
 10 longer draw pictures for her friends, and then compelled B.B. to apologize to M.C.
 11 for the drawing. (B.B. Depo Vol 1, pg. 22:7).

12 "In the absence of binding precedent, district courts should look to 'all
 13 available decisional law including the decision of *state courts, other circuits, and*
 14 *district courts* to determine whether the right was clearly established." *Lanier*, 520
 15 U.S. at 271 (emphasis added). In a more recent 8-1 decision made by the Supreme
 16 Court, with regard to student speech under *Tinker*, the Court found that a high
 17 school cheerleader who sent a vulgar Snapchat post to classmates, while off campus,
 18 was not within its sphere of control. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct.
 19 2038, 2049 (2021). To discipline the cheerleader in *Mahanoy* was unconstitutional.
 20 *Id.* The Court reasoned that "public school students, like all other Americans, have
 21 the right to express 'unpopular' ideas on public issues, *even when those ideas are*
 22 *expressed in language that some find 'inappropriate' or 'hurtful.'*" *Id.* (emphasis
 23 added). While B.B. does not contend that the speech was initiated off campus, it is
 24 critical to note, as this Court has in prior Orders, that the drawing was not even an
 25 issue until a mother, at home and outside of school hours, found it. (Dk. No. 55) The
 26 drawing did not depict any bodily harm to other students or staff, nor portrayed any
 27 concerning ideas of imminent danger. (Exhibit L).

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1 *See Dariano Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir. 2014)
 2 (finding “peaceful, passive expression” cannot be suppressed based on the reactions
 3 of other students.); *J.C.*, 711 F.Supp.2d at 1094. (finding insufficient disruption
 4 when a student posted a video on YouTube in which several classmates made
 5 derogatory, sexual and profanity-laced comments about a classmate); *Castro v.*
 6 *Clovis Unified Sch. Dist.*, 604 F.Supp.3d 944, 950 (2022) (finding insufficient
 7 disruption when a school principal’s only evidence was that she believed, based on
 8 her experience, the plaintiff’s speech relating to race, would cause a “potential”
 9 disruption before and during a graduation); *Salek v. Passaic Collegiate School*, 255
 10 N.J. Super. 355 (App. Div. 1992) (finding insufficient disruption when a
 11 controversial picture was published in the school yearbook as the picture “neither
 12 represented an invasion of the rights of other nor an interference with the school’s
 13 mission.”); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 44 (10th Cir. 2013)
 14 (“For a school’s forecast [of disruption] to be reasonable, courts generally require
 15 that it be based on a **concrete threat of substantial disruption.**”) (“*Tinker* rejected
 16 the idea that a silent, passive expression that merely provokes discussion in the
 17 hallway constitutes such a threat, particularly if that expression is political.”)
 18 (emphasis added).

19 *Tinker* made clear that student speech, which does not cause a disturbance in
 20 school activities nor can be forecasted to do so, is protected: “our Constitution does
 21 not permit officials of the State to deny [this] form of expression.” *Id.* at 514.
 22 Granting Becerra qualified immunity from his violation of B.B.’s First Amendment
 23 right to free speech in a public-school context, is to move the line further away from
 24 protections expressed in *Tinker*. Thus, Becerra is not entitled to qualified immunity.

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C. B.B. has established that her First Amendment right against Retaliatory Harrasment was violated such that Becerra and Victa are not entitled to Qualified Immunity

“To establish a First Amendment retaliation claim in the context of student speech, a plaintiff must show that (1) he was engaged in a constitutionally protected activity, (2) the defendant’s actions would child a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant’s conduct.” *Pinard v. Clatskanie School Dist.* 6J, 467 F.3d 755, 770 (9th Cir. 2006). *See also Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858 (9th Cir. 2016). It is established that “[t]he First Amendment forbids government officials from retaliating against individuals for speaking out.” *Blair v Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010). Further, any retaliatory actions taken by a government official that could implicate a First Amendment violation, “must be of a nature that would stifle someone from speaking out.” *Id.* at 544. “Once a plaintiff has made such a showing, the burden shifts to the government to show that it ‘would have taken the same action even in the absence of the protected conduct.’” *O’Brien v. Welty*, 818 F.3d 920, 933 (9th Cir. 2016) *quoting Pinard*, 467 F.3d at 770.

In order to succeed in a First Amendment retaliation claim, the plaintiff needs to show that the defendant’s “actions had a retaliatory motive.” *Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009). A plaintiff can create a genuine issue of material fact,

“on the question of retaliatory motive when he or she produces, *in addition to evidence that the defendant knew of the protected speech*, at least (1) evidence of proximity in time between the protected speech and the allegedly retaliatory decision. (2) **evidence that the defendant expressed opposition to the speech** or (3) evidence that the defendant's proffered reason for the adverse action was *false or pretextual*.”

1 According to the Ninth Circuit, the second prong requiring that the retaliation
 2 “chill a person of ordinary firmness” looks at the disciplinary action that did occur
 3 and where that would lead students “in the plaintiffs’ positions to refrain from
 4 protected speech.” *O’Brien v. Welty*, 818 F.3d at 933.

5 **i. Becerra’s Actions Amount to Retaliatory Harassment**

6 1. The March 31, 2021, Incident

7 Here, Defendant argues that the discipline B.B. received was “minimal to
 8 non-existent.” (Defendant’s Motion for Summary Judgment (“DMSJ”), at 20).
 9 However, at the time of the incident, B.B. was a seven-year-old first grader and
 10 Becerra was her school principal. For a young child, who uses drawing and art as a
 11 therapeutic outlet, to be suddenly reprimanded and told that not only was her
 12 drawing “inappropriate,” “racist,” that she needed to apologize to M.C. for it, and
 13 would no longer be allowed to draw pictures for her friends, is chilling. (B.B. Depo
 14 Vol. 1, pg. 18:21-25). Defendant argues that Becerra did not tell B.B. himself that
 15 she had to sit out from recess for two weeks, and so even if that occurred, it can’t be
 16 related to him. (B.B. Depo Vol. 1, pg. 29:22-24). However, based on the proximity
 17 of time between Becerra scolding her on the playground, to immediately being
 18 stripped of recess when B.B. got back into the classroom, it is clear the connection
 19 between the two events. *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741
 20 (9th Cir. 2001). Further, it is the burden of the “defendants to show through
 21 evidence they would have punished the plaintiffs under those circumstances” absent
 22 the protected speech. *Pinard*, 467 F.3d 755, 770. Defendants are unable to allege as
 23 much here. Without B.B.’s drawing containing the words “Black Lives Mater” and
 24 “any life,” Becerra would not have referred to the picture as “inappropriate” or
 25 “racist,” nor disciplined her at all.

26 B.B. has provided supporting evidence to establish that (1) her speech was
 27 constitutionally protected, (2) that Becerra’s disciplinary actions would chill a child,
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1 at seven years old, from continuing her right to free speech on the controversial
 2 topic, and (3) that the content of the drawing is what motivated Becerra to discipline
 3 B.B.

4 2. The August 23, 2022, Incident

5 During the incident of August 23, 2022, when B.B. was followed closely by
 6 Victa, it is clear she was distraught. (Exhibit A). At this point in time, B.B.'s
 7 mother, Boyle, had been going through the investigative appeals process within
 8 CUSD, claiming that Becerra had wrongfully disciplined B.B. (Boyle Depo Vol. 2,
 9 pg. 76: 17-19). After the August 23, 2022, incident, B.B. wrote a letter to Becerra,
 10 asking him to be kinder to her and her family. (B.B. Depo Vol. 2, pg. 79: 10-19).
 11 There had been some form of awareness leading back to the March 31, 2021, prior
 12 to the August 23, 2022. Becerra stood back and watched as Victa did his bidding,
 13 watching B.B., who is under his care, cry and attempt to flee from Victa, all the
 14 while standing still. (Exhibit A). Defendant argues that because there were no
 15 discussions with B.B. specifically relating to the March 31, 2021, incident, or that
 16 these events are distant in time, it must be obvious that these events are not related.
 17 (DMSJ at 21, FN 1). However, from March 2022 until August 2022, CUSD was in
 18 the middle of an appeal regarding Becerra's conduct with B.B. (Boyle Depo Vol. 2,
 19 pg. 76: 17-19). Becerra's actions on August 23, 2022, are derivative of the
 20 underlying constitutional violation as the events from March 31, 2021, remained
 21 enough present in place to allow for his retaliatory actions to be connected. If
 22 Defendant argues that Becerra stood back as a result of the ongoing appeal, so as to
 23 not further implicate himself, it ties his actions of watching B.B. be aggressively
 24 followed to the underlying constitutional violation.

25 Therefore, B.B. has provided supporting evidence to establish that (1) her
 26 speech was constitutionally protected, (2) that Becerra's disciplinary actions would
 27 chill a child, at seven years old, from continuing her right to free speech on the
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1 controversial topic, and (3) that the content and disputes regarding the appeals
2 process is what motivated Becerra to further retaliate against B.B.

3 **ii. Victa's Actions Amount to Retaliatory Harassment**

4 On August 23, 2022, Victa, was called by Becerra to the
5 courtyard/playground where Becerra also happened to be. (Victa Depo pg. 18:15-
6 16). When B.B. arrived, it was apparent that both children were uncomfortable.
7 (Exhibit A). Victa did not leave when B.B. asked her to go, nor did Victa leave B.B.
8 as she went into the girls' restroom. (B.B. Depo Vol 2, pg. 68:8-24). Victa continued
9 to aggressively pursue B.B., enough that B.B. felt a need to call Boyle to retrieve her
10 from campus. (B.B. Depo Vol. 2, pg. 68:8-24). Victa was a staff member at Viejo
11 Elementary School, certainly not residing in a vacuum unknowing of the contentions
12 between B.B.'s family and Becerra because of the March 31, 2021, incident. Victa
13 had even referred to B.B.'s mother as "mentally unstable." (B.B.'s Response to
14 Vita's Interrogatories, No. 8). While, as Defendant claims, this event occurred
15 months later from the initial violation of B.B.'s First Amendment right, it is
16 apparent based on the supporting evidence, that Victa created her own narrative of
17 who B.B. and her family were as a result of B.B.'s mother being advocating for her
18 daughter. The underlying basis for Victa's action remains connected to B.B.'s free
19 speech violation. There is no requirement that a plaintiff must show actual
20 suppression of protected speech, just that the defendant's intentional hindrance
21 resulted in injury. *See Arizona Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858,
22 867 (9th Cir. 2016). B.B. was severely emotionally injured as a result of Victa's
23 actions. (B.B.'s Response to Victa's Interrogatories, No. 7).

24 Therefore, B.B. has provided supporting evidence to establish that (1) her
25 speech from March 2021 was constitutionally protected, (2) that Victa's actions of
26 aggressively following B.B. would chill a child from continuing to speak on the
27 drawing, and (3) that the content and disputes regarding the appeals process is what
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1 motivated Victa to further retaliate against B.B.

2 **VI. DEFENDANTS ARE NOT ENTITLED TO SUMMARY**

3 **JUDGMENT FOR PLAINTIFF’S THIRD CAUSE OF ACTION**

4 The elements required to establish a claim for intentional infliction of
 5 emotional distress are: “(1) extreme and outrageous conduct by the defendant with
 6 the intention of causing, or reckless disregard of the probability of causing,
 7 emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress;
 8 and (3) actual and proximate causation.” *Christensen v. Superior Ct.*, 54 Cal. 3d
 9 868, 100 (1991). Conduct is considered extreme and outrageous if it is “so extreme
 10 as to exceed all bounds of decency that would be tolerated in a civilized
 11 community.” *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 1001 (1993).
 12 “Generally, conduct will be found to be actionable where the recitation of the facts
 13 to an average member of the community would arouse his resentment against the
 14 actor, and lead him to exclaim, ‘Outrageous!’” *Helgeson v. American International*
 15 *Group, Inc.*, 44 F.Supp.2d 1091, 1095 (S.D.Cal. 1999).

16 Courts use several factors to decide whether conduct is extreme and
 17 outrageous, including whether the “defendant abuses a relationship or position of
 18 trust which gives him power to damage Plaintiffs’ interests” and whether the
 19 defendant “knows the plaintiff is susceptible to injuries through mental distress.”
 20 *Newby v. Alto Riviera Apartments*, 60 Cal. App. 3d 288, 297 (1976). “Mere
 21 insulting language, without more, ordinarily would not constitute extreme outrage
 22 unless it is combined with aggravated circumstances.” *Smith v. BP Lubricants USA*
 23 *Inc.*, 64 Cal.App.5th 138 (4th Dist. 2021) (citations omitted). *See also Alcorn v.*
 24 *Anbro Engineering, Inc.*, 2 Cal.3d 493, 499 (1970). In fact, the “outrageous
 25 character of the conduct may arise from the actor’s knowledge that the [plaintiff] is
 26 peculiarly susceptible to emotional distress.” *Crouch v. Trinity Christian Center of*
 27 *Santa Ana, Inc.*, 39 Cal.App.5th 995, 1008 (4th Dist. 2019) (emphasis added).

A. B.B. Has Established her Claim Against Becerra

Here, Becerra was obviously aware of B.B.'s status as a minor child in his school. (Becerra Depo pg. 16:21-24). Actions taken against a minor child could certainly be deemed more outrageous than if the same action was taken against an adult, especially if there is a preexisting condition that he is aware of. *See Crouch*, 39 Cal. App. 5th at 1008. B.B. used drawing as a therapeutic outlet for her Attention Deficit Hyperactivity Disorder ("ADHD"). For B.B. to be disciplined, for a constitutionally protected activity, and told that her drawing was "inappropriate," "racist" and that she would not be allowed to draw pictures for her friends anymore, is far more severe than a reasonable juror would find acceptable given her age. (B.B. Depo Vol. 1, pg. 18: 21-25). B.B. was so distraught by the discipline Becerra lashed out, that she didn't know what to do other than oblige him and apologize to M.C. (B.B. Depo Vol. 1, pg. 22:16-17). B.B. felt shame and humiliation, leading to severe emotional distress that no reasonable person would find a seven-year-old child should be left to feel for the drawing she created. (B.B. Depo Vol. 1, pg. 34:10-12).

Regarding the August 23, 2022, incident, Becerra's conduct, again, amounts to extreme and outrageous conduct. Becerra, the principal of the school, acted as a wallflower while B.B. was demanding Victa leave her alone. (Exhibit A). He was aware of the ongoing disputes involving the appeals process. After the incident on August 23, 2022, he was also B.B. wrote a letter to Becerra asking him to be kinder to her and her family. (B.B. Depo Vol. 2, p 79:10-19). Victa claims that Becerra's reasoning for calling her there was *not* a safety concern. (Victa Depo, pg. 25:2). Keeping these facts in mind, it's clear that Becerra was aware that B.B. was more susceptible to mental injury during this time in her life. Yet, he did nothing to stop it. (Exhibit A). In fact, he provoked it by calling Victa to come and handle the situation and then, even when he realized B.B. was distraught, he remained planted

1 where he was. (Exhibit A). A reasonable jury could find that Becerra's actions on
2 August 23, 2022, amount to extreme or outrageous conduct.

3 **B. B.B. Has Established her Claim Against Victa**

4 B.B., being a minor child in the care of Victa, (a counselor at Viejo
5 Elementary) while on school grounds, during school hours, acted extreme or
6 outrageous when Victa aggressively followed B.B. and her brother around the
7 courtyard. (Exhibit A). Victa even continued to follow B.B. as she attempted to
8 evade her by going to the girls' restroom. (B.B. Depo Vol. 2, pg. 68:8-24). B.B.
9 asked Victa to leave her alone. (B.B. Depo Vol. 2, pg. 68:8-24). Victa continued her
10 uncomfortable pursuit of closely following B.B. (Exhibit A). These actions
11 continued to haunt B.B., who felt the severe weight of trust issues with school staff
12 members. (B.B. Depo Vol. 2, pg. 91:2-4). In fact, B.B. continues to suffer from
13 physical manifestations of her emotional trauma deriving from this incident,
14 resulting in physical harm to B.B. (B.B.'s Response to Victa's Interrogatories, No.
15 7) (Exhibit M). The circumstances surrounding this incident could lead a reasonable
16 jury to find that these actions, by a school counselor, amount to extreme or
17 outrageous conduct.

18 Becerra and Victa's actions in these events were extreme and outrageous,
19 leaving B.B. to suffer emotional distress as a result. This Court has already noted
20 that "the SAC alleges that CUSD forbid B.B. from drawing pictures, and that
21 drawing was one of her primary therapeutic outlets for her ADHD. If true, a
22 reasonable jury could find that Becerra's alleged punishment was excessive." (Dk.
23 No. 55). B.B. has suffered emotionally and physically as a result of both Becerra's
24 and Victa's actions. For this and the reasons herein, Defendants should not be
25 entitled to summary judgment on B.B.'s claim for Intentional Infliction of
26 Emotional Distress.

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**VII. PLAINTIFF’S THIRD AND FOURTH CAUSES OF ACTION
BASED ON STATE LAW CLAIMS COMPLY WITH THE
GOVERNMENT CODE**

Defendants assert that B.B.’s Third and Fourth causes of action fail because they do not comply with the government code § 945.4. California courts have explained that “the [governmental tort] claims statutes which are designed to protect governmental agencies from stale and fraudulent claims, provide an opportunity for timely investigation and encourage settling meritorious claims *should not be used as traps for the unwary when their underlying purposes have been satisfied.*” *Johnson v. San Diego Unified Sch. Dist.*, 217 Cal. App. 3d 692 (1990), modified (Feb. 20, 1990) (emphasis added). In fact, “[t]he point of the requirement is not to establish a needless formality, but to permit the public entity to avoid litigation by enabling it to conduct an early investigation and consider the benefits of settling a claim.” *Alliance Financial v. City. and Cnty. of San Francisco*, 64 Cal.App.4th 635, 647 (1998). Based on this policy, the following test applies to determine whether a plaintiff has met the filing requirements to bring a tort claim against a governmental agency:

the courts employ a test of substantial compliance, rather than strict compliance... In other words, “[w]here there has been an attempt to comply but the compliance is defective, the test of substantial compliance controls. Under this test, **the court must ask whether sufficient information is disclosed on the face of the filed claims ‘to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit.’**” (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal. App. 3d 1071, 1083 [195 Cal. Rptr. 576], *quoting City of San Jose v. Superior Court, supra*, 12 Cal. 3d at p. 456; *Pacific Tel. & Tel. Co. v. County of Riverside, supra*, 106 Cal. App. 3d at p. 188.) In appropriate cases, **where the public entity has suffered no prejudice, substantial compliance will be found.** (*Elias v. Bernardino County Flood Control Dist., supra*, 68 Cal. App. 3d at p. 74; *Donohue v. State of California* (1986) 178 Cal. App. 3d 795, 804 [224 Cal.Rptr. 57].) **“So long as the purposes of the claims statute are effectuated, its requirements**

1 **should be given a liberal construction in order to**
 2 **permit full adjudication of the case on its merits.”** *Dilts*
 3 *v. Cantua Elementary School Dist.*, *supra*, 189 Cal. App.
 3d at p. 33; *Minsky v. City of Los Angeles* (1974) 11 Cal.
 3d 113, 123. (emphasis added).

4 *Johnson v. San Diego Unified Sch. Dist.*, 217 Cal. App. 3d 692, 697 (1990),
 5 *modified* (Feb. 20, 1990) (emphasis added). Under this test, the court must
 6 determine whether sufficient information is disclosed on the face of the filed claim
 7 to reasonably enable the public entity to make an adequate investigation of the
 8 merits of the claim and to settle it without the expense of a lawsuit. *White v. Moreno*
 9 *Valley Unified Sch. Dist.*, 181 Cal. App. 3d 1024, 1031, 226 Cal. Rptr. 742 (1986).
 10 Under this broad standard, even if a formal claim is not submitted at all, a claim may
 11 still be considered valid as long as the public entity is notified in some manner of the
 12 claim's existence and the claimant's intention to pursue litigation if necessary. *See*
 13 *Alliance Financial v. City & County of San Francisco*, 64 Cal. App. 4th 635, 647,
 14 75 Cal. Rptr. 2d 341 (1998).

15 Here, Boyle submitted a claim on behalf of her minor daughter, B.B.
 16 However, CUSD objects to this claim because B.B. was not named. As indicated by
 17 the supporting evidence herein and attached as “Exhibit I” and “Exhibit J”,
 18 sufficient information is disclosed in the claim and in e-mail notices to reasonably
 19 enable CUSD to (1) make an adequate investigation on the merits of the claim that
 20 B.B. suffered damages and/or emotional distress due to the intentional and negligent
 21 acts of Becerra and CUSD and (2) settle the claim(s) without the expense of the
 22 lawsuit. “Exhibit J” shows that “the notification to the public entity that the claimant
 23 was asserting an actionable right to money or damages and that a failure to settle the
 24 dispute would lead to court action.” *Alliance*, 64 Cal. App. 4th at 647. Boyle
 25 submitted e-mails to CUSD staff to inform them of impending litigation if the issues
 26 were not resolved. (Exhibit J). Further, B.B. has met the *Phillips* standard. *Phillips*
 27 *v. Desert Hospital Dist.*, 49 Cal.3d 699 (1989). (the court found substantial
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1 compliance without proper Tort Form served). Therefore, substantial compliance is
2 met at the very least. *Id.*

3 Here, CUSD had notice of all claims asserted by Boyle on behalf of B.B.
4 (Exhibit I, J). A review of the claim shows that it clearly articulates harm to B.B.
5 For example, the claim specifically informs CUSD that B.B. was disciplined for the
6 drawing at issue and compelled to apologize, resulting in B.B. feeling humiliated
7 and terrified to engage in drawing at school. Exhibit L. *See Alliance Financial v.*
8 *City and Cnty. of San Francisco*, 64 Cal. App. 4th 635 (Dist. Ct. App. 1998) (“The
9 point of the requirement is not to establish a needless formality, but to permit the
10 public entity to avoid litigation by enabling it to conduct an early investigation and
11 consider the benefits of settling a claim.”)

12 Therefore, even if a plaintiff is not as the named “claimant” in a tort form, the
13 plaintiff can still rely on the substantial compliance doctrine and proceed with her
14 claim if the government agency was provided with adequate information to
15 investigate the matter. Accordingly, in B.B.’s case, a claim was filed with the
16 correct government agency, the claim provided more than adequate notice to the
17 government of the damages to allow the government to make an adequate
18 investigation into the matter, and there was no prejudice to Defendants. Lastly,
19 Plaintiff’s counsel even attended a Board meeting for CUSD, informing them at
20 such time the potential of litigation. Exhibit K. The substantial compliance doctrine
21 allows B.B. to proceed with her claim. *See Green v. State Ctr. Comm. Coll. Dist.*, 34
22 Cal. App. 4th 1348, 1357-1358 (1995) (“the public entity must be able to discern
23 from the letter that a claim is being made that will result in litigation if not otherwise
24 satisfied.”).

25 Finally, the fact that B.B. was a minor throughout the entire period for filing a
26 claim provides an independent ground for relief from the claim presentation
27 requirement. This principle is well-established in California jurisprudence. *See*
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1 *Tammen v. County of San Diego*, 66 Cal. 2d 468, 479-480, 58 Cal. Rptr. 249, 426
 2 P.2d 753 (1967); *Hernandez v. County of Los Angeles*, 42 Cal. 3d 1020, 1029-1031,
 3 232 Cal. Rptr. 519, 728 P.2d 1154 (1986); *Ridley v. City etc. of S.F.*, 272 Cal. App.
 4 2d 290, 292-293, 77 Cal. Rptr. 199 (1969).

5 **VIII. DEFENDANTS ARE NOT ENTITLED TO SUMMARY**

6 **JUDGMENT FOR PLAINTIFF’S FOURTH CAUSE OF ACTION**

7 “Generally, whether a defendant was negligent constitutes a question of fact for
 8 the jury.” *Federico v. Superior Court*, 59 Cal. App. 4th 1207, 1214 (1997). Only if it
 9 is possible for “one conclusion from the evidence presented, lack of negligence may
 10 be determined as a matter of law, and summary granted.” *Id.* To establish a claim for
 11 negligence, the plaintiff must show that “the defendant had a duty to use due care,
 12 that he breached that duty, and that the breach was the proximate or legal cause of
 13 the resulting injury.” *Nally v. Grace Community Church*, 47 Cal.3d 278, 292 (1988).
 14 As a threshold matter for negligent retention and/or supervision, the plaintiff must
 15 show a duty of care owed by the defendant. *Brown v. USA Taekwondo*, 11 Cal. 5th
 16 204 (2021). “[A]bsent a special relationship, there can be no individual liability to
 17 third parties for negligent hiring, retention or supervision of a fellow employee.”
 18 *C.A. v. William S. Hart Union High Sch. Dist.*, 53. Cal.4th 861, 877 (2012).
 19 However, it is established that “school district[s] and its employees have a special
 20 relationship with its” students. *Id.*

21 **A. B.B. has Established that CUSD had a Duty of Care, that CUSD** 22 **Breached its Duty of Care, Proximately Causing her Injuries**

23 It is not a surprise that public school teachers are charged with the duty to
 24 exercise reasonable care in supervising students as the California courts have
 25 expressed, “in the eyes of a child, a teacher’s authority can be very great.” *John R. v.*
 26 *Oakland Unified Sch. Dist.*, 48 Cal. 3d 438, 449 (1989). It is clear based on
 27 precedent that “acts leading up to the tort must bear some relation to the employee’s
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1 duties.” *Alma W. v. Oakland Unified Sch. Dist.*, 123 Cal.App.3d 133, 141 (1981). In
 2 *White*, the court found that the officer “is entrusted with a great deal of authority,”
 3 which is similar here. *White v. County of Orange*, 166 Cal.App.3d 566, 571 (1985).
 4 The officer’s “wrongful acts flowed from the very exercise of this authority. It
 5 follows that the [district] be responsible for acts done during the exercise of this
 6 authority.” *Id.* The critical question “is not on whether the police officer’s authority
 7 is either characteristic or foreseeable, **but rather on whether the [tort] arose out**
 8 **of the exercise of job-created authority.**” *Jeffrey E. v. Cent. Baptist Church*, 197
 9 Cal. App. 3d 718, 723 (1988). The California test for determining scope of
 10 employment turns on where “(1) the act performed was either required or incident to
 11 his duties or (2) the employees misconduct could be reasonably foreseen by the
 12 employer in any event.” *Washington v. United States*, 868 F.2d 332, 334 (9th Cir.
 13 1989).

14 Here, Becerra’s actions clearly rose out of his duty as an elementary school
 15 principal. The act of determining which discipline to dole out on a student for
 16 conduct is exactly what would be expected. Had Becerra been a janitor of the
 17 school, for example, that iterated the same reprimand as Becerra, it would be
 18 unlikely that this Court would find those actions imputed onto CUSD. *See Roe v.*
 19 *Hesperia Unified Sch. Dist.*, 85 Cal. App. 5th (2022). However, this case is
 20 straightforward. Unlike a majority of the case law on this issue, which deals with
 21 sexual assault of students, Becerra’s reprimand of B.B. is well within his authority
 22 granted by CUSD. Disciplining students is *incidental* to Becerra’s role as principal.
 23 CUSD cannot escape liability merely because they argue it was “not foreseeable.”
 24 *See Jeffrey*, 197 Cal. App. 3d at 723.

25 Defendants also point out that the *Rowland* factors need to be addressed when
 26 dealing with special relationships. *C.I. v. San Bernardino City Unified Sch. Dist.*, 82
 27 Cal.App.5th 974, 984 (2022). The first three dealing with foreseeability refers to
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1 “whether the injury was foreseeable” and if there is “more than a mere possibility of
 2 occurrence.” *Id.* The last dealing with moral blame and future risk of harm or
 3 consequences to the community. *Id.* Here, Becerra’s actions, being faced with a
 4 child’s right to free speech, is foreseeable. Each day Becerra works at an elementary
 5 school, it is foreseeable that he will have controversial issues that arise, so
 6 foreseeable in fact that CUSD has guidance and Board policy on this issue. Exhibit
 7 H. “A court must weigh and balance these [factors], recognizing that the **most**
 8 **important among them is the foreseeability of the harm to the plaintiff.**” *Smith*
 9 *v. Freund*, 192 Cal.App.4th 466, 474 (4th Dir. Ct. App. 2011) (emphasis added).

10 To combat the rest of the *Rowland* factors, Defendant cites *Dailey* in “[S]chool
 11 districts and their employees have never been considered insurers of the physical
 12 safety of students.” *Dailey v. Los Angeles Unified Sch. Dist.* 2 Cal.3d 741, 747
 13 (1970). However, this case, as pointed out in *LeRoy v. Yarboi*, has little weight
 14 anymore as it has since been superseded by statute. *LeRoy v. Yarboi*, Cal. App. 5th
 15 737 (4th Dist. Ct. App. 2021). It is critical to remind the Court that Becerra did not
 16 merely tell B.B. that the drawing was inappropriate. Becerra told B.B. that the
 17 drawing was “inappropriate” and “racist” and that she could no longer draw pictures
 18 for her friends anymore, citing M.C.’s parents being the reason. (B.B. Depo pg.
 19 21:2-8). The moral blame and risk for future harm or consequences to the
 20 community is clearly present. Further, the actions of both Becerra and Victa on
 21 August 23, 2022, were foreseeable and should not “skirt liability” as the Defendant
 22 suggests simply because Victa claims to have been worried for a student. (DMSJ at
 23 28-29). Footage of the incident shows a counselor, who does not appear to be
 24 worried or concerned, but rather aggressive and annoyed. (Exhibit A). These actions
 25 were foreseeable by CUSD, and these actions point a risk for future harm or
 26 consequences to the student body and community.

1 The district must be made aware of “facts which would warn a reasonable
 2 person that the employee presents an undue risk of harm to third persons in *light of*
 3 *the particular work to be performed.*” *Federico v. Superior Court*, 59 Cal. App. 4th
 4 at 1214. However, “[i]t is **not necessary to prove that the very injury that**
 5 **occurred must have been foreseeable** by the school authorities. Their negligence is
 6 established if a reasonable prudent person would foresee that injuries of the same
 7 general type would be likely to happen in the absence of adequate safeguards.” *D.Z.*
 8 *v. Los Angeles Unified Sch. Dist.*, 35 Cal. App. 5th 210 (2019) (emphasis added).
 9 Here, Becerra’s actions are attributable to the District for Becerra’s apparent lack of
 10 training by CUSD, on an already established topic that CUSD had Board policies
 11 on. (Becerra Depo pg. 21:10-14). *See C.A. v. William S. Hart Union High School*
 12 *Dist.*, 53 Cal. 4th 861, 871 (2012)(finding that school principals owe a special duty
 13 and special relationship to students). Defendant has failed to give any authority that
 14 would permit a departure from a duty owed here. CUSD owed a duty of care to B.B.

15 Once duty has been established, breach and causation remain to be evaluated *Id.*
 16 The duty owed by CUSD was breached when CUSD failed to remediate the
 17 situation after B.B.’s drawing incident with Becerra came to light in March 2022.
 18 Becerra had never been properly trained by CUSD, prior to the incident, or even
 19 after on how his response should have been handled. (Becerra Depo pg. 21:10-14).
 20 Becerra, the principal of Viejo Elementary, is unaware of trainings that would be
 21 given to staff, much less to him. (Becerra Depo pg. 21:10-14). CUSD failed to take
 22 preemptive measures to ensure that training was conducted for its staff. (Becerra
 23 Depo 21:10-14). As a direct and proximate cause for CUSD’s failure to equip
 24 Becerra with how to approach controversial topics, B.B. was injured. *See Doe v.*
 25 *Manhattan Beach Unified Sch. Dist.*, Cal. Super. LEXIS 40346 (2023) (“where the
 26 measures the District took to prevent sexual abuse of students ... were reasonable is
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1 a case-specific question of breach. **And it is a question for the jury, not the court**
 2 **on summary judgement.**”) (emphasis added).

3 Further, CUSD continued to breach its duty to B.B. when it retained Becerra
 4 even though B.B. had been unconstitutionally disciplined. (B.B. Depo Vol. 1, pg.
 5 18:20-25). Then, because CUSD retained Becerra, he was then able to retaliate
 6 against B.B. for filing a complaint with CUSD. (Victa Depo pg. 25:2-6). CUSD had
 7 been put on notice since March 2022 that Becerra had a propensity for violating
 8 B.B.’s rights. (B.B. Depo Vol. 1, pg. 18:20-25). Yet, he remained in a position of
 9 power over B.B. and other students. If Defendants’ argument is that CUSD was not
 10 on notice of Becerra’s conduct in March 2021, it is hard to follow that argument
 11 when it comes to the retaliatory acts of Becerra and Victa on August 23, 2022.
 12 *Thompson v. Sacramento City Unified Sch. Dist.*, 107 Cal. App. 4th 1352 (2003).

13 IX. CONCLUSION

14 Becerra and Victa are not entitled to Qualified Immunity. To grant Qualified
 15 Immunity to Becerra and Victa is to remove the protection handed down in *Tinker*,
 16 ensuring that students in public schools cannot be disciplined for speech of this type.
 17 B.B. has established that her constitutional right to free speech was violated and that
 18 it is in fact a “clearly established” right. Further, CUSD was put on notice of these
 19 claims, regarding these same incidents, when B.B.’s mother and guardian ad litem,
 20 Boyle, filed a Tort Claim, apprising CUSD of the issues that needed to be addressed
 21 or litigation would ensue. Further, B.B. has provided supporting evidence to
 22 establish her Claims for violation of her First Amendment right, Retaliatory
 23 Harassment, Intentional Infliction of Emotional Distress, and Negligent Supervision
 24 and/or Retention. B.B. further provided notice by pursuing internal complaints with

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1 the district. Based on the information herein, B.B. respectfully requests this Court
2 deny Defendant's Motion for summary Judgment, or Summary Adjudication.

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4 DATED: January 22, 2024

HEATH LAW, PLLC

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7 By: /s/ Amber R. Terry

8 **AMBER R. TERRY**

9 *Attorney for Plaintiff*
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